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Supreme Court of Michigan.

MANN v. WHITE RIVER LOG AND BOOMING COMPANY.

The handling of logs, as managed by log-driving and booming companies, is not properly to be treated as common carriage; and such companies are not subject to the common-law liabilities of common carriers.

ERROR to the Circuit Court of Muskegon county.

F. W. Cook, for plaintiff in error.

Frank Bracelin, for defendant in error.

The opinion of the court was delivered by

CAMPBELL, J.—Plaintiff sued defendant for not delivering part of a quantity of logs which the company had in charge to deliver at White Lake, after running them down from their place of reception on White river. As the case was passed upon by the jury they necessarily found that there had been no fault or negligence in defendant, and the only question before us is whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty. The duty undertaken by the defendant was in accordance with its statutory power to drive, run, raft and boom logs in White river, for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates, and for all alike.

The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage. It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges: Comp. Laws, sect. 2788. The statute, moreover, gives a special remedy to enforce the lien. Is also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for. These rights resemble, in important respects, the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.

When we look at the business done, it will be found to resemble in some respects the business of carriage, and in some respects it

is like different business, while in most things it is peculiar and subject to its own conditions. It has one peculiarity in which it differs entirely from common carriage, which was held by this court in *Fitch* v. *Newberry*, 1 Doug. 1, to create no rights against property not voluntarily intrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream: Comp. Laws, sect. 2793. The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct the floatage. And it is to prevent this that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness. Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are quite as analogous as carriage. Drovers—or as the common law calls them agisters—perform functions not unlike those of log-drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of

intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers: Angell on Carriers, sects. 24, 52; Story on Bailments, sect. 443.

The entire absence of any motive power, and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship and often wrong in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we cannot wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants.

The judgment must be affirmed with costs.

"To bring a person," says Judge STORY in his work on Bailments, sect. 495, "within the description of a common carrier, he must exercise it as a public employment, he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place."

"Common carriers," says Chancellor KENT, 2 Com. 598, "undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price."

"The definition of a common carrier most usually adopted in this country," says Mr. Hutchinson in his work on Carriers, sect. 47, note, "is that of C. J. PARKER in *Dwight* v. *Brewster*, 1 Pick. 50. He is there defined to be 'one who undertakes for hire, to transport the goods of such as choose to employ him, from place to place.' In *Gisbourn* v. *Hurst*, 1 Salk. 249, he is said to be 'any man undertaking for hire to carry the goods of all persons indifferently.' And this is said by C. J. GIBSON in *Gordon* v. *Hutchinson*, 1 W. & S. 285, to be 'the best definition of a common carrier in its application to the business of this country.'"

Mr. Hutchinson himself, in his work on Carriers, sect. 47, gives the following definition: "A common or public carrier is one who undertakes as a business, for hire or reward, to carry from one place to another, the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier; and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal."

The definition of Mr. Hutchinson,

while somewhat less general than the others quoted above, agrees with them in making the *carriage of goods* a necessary element of the definition. Indeed, as to those classes of business involving no active carriage, it is difficult, as stated by the learned judge who delivered the opinion of the court in the principal case, to see how, if involving no carriage, there is any propriety in calling them carriage. Although it is wholly immaterial in what kind of vessel or vehicle, or for what distance the carrying is done (Hutchinson on Carriers, sect. 58), such carriage, in fact, must exist or be contemplated before the extraordinary liabilities of a common carrier can attach. Thus, where there are no goods to be transported, but only a message to be delivered, as in the case of the business of telegraph companies, the liability of the telegraph company, according to the weight of authority, is not that of a common carrier: *Leonard* v. *N. Y., &c., Telegraph Co.*, 41 N. Y. 571; *Breese* v. *U. S. Telegraph Co.*, 48 Id. 132; *Tyler* v. *West. Union Tel. Co.*, 60 Ill. 421, 427; Hutchinson on Carriers, sect. 81. So, warehousemen, wharfingers and forwarders of freight, so long as they confine themselves to the business which their names import, and which do not involve the carriage of the goods, cannot be held liable as common carriers: Hutchinson on Carriers, sect. 62. So, according to the weight of authority, the owners of a steamboat employed in the towing of other boats or vessels, do not incur the responsibility of common carriers as to the tow, the property towed not being delivered to them nor placed within their exclusive custody or control: see Hutchinson on Carriers, sect. 79, where the cases are fully collected.

The question decided in the principal case appears to be one of first impression, and in view of the definitions and rules above quoted, and the reasoning of the opinion itself, will, we think, be accepted and followed as an eminently satisfactory solution of the important question involved in the case.

MARSHALL D. EWELL.

Supreme Court of Iowa.

KINNEY *v.* McDERMOTT.

Plaintiff agreed with defendant on Sunday, at the house of the latter, to give defendant a horse and $25, in exchange for a horse of defendant. This was consented to, and on the same day, pursuant to said agreement, plaintiff left his horse with defendant, and took the horse of the latter away. The money was to be paid the following Sunday at the house of the plaintiff. On Tuesday, following the exchange, defendant in the plaintiff's absence, and without his knowledge or consent, returned to the stable of the latter the horse received of him, and took away the horse he let plaintiff have. A day or two later, plaintiff replevied the horse so taken, and has since kept both horses, using the one returned by defendant and not offering to return either horse or money. *Held*, that as the original contract was an unlawful one, the court would render no aid to either party upon the contract; but, as the plaintiff's possession was *prima facie* evidence of ownership, he might, on the strength of that possession and the trespass of defendant, maintain replevin for the horse so taken away by defendant.